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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re R.T., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. B.C., Defendant and Appellant.	D056018 (Super. Ct. No. J516975)

APPEAL from a judgment of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Reversed and remanded with directions.

B.C. appeals the judgment terminating her parental rights to her daughter, R.T. B.C. contends the juvenile court erred by declining to apply the beneficial relationship

exception to termination (Welf. & Inst. Code,[1] § 366.26, subd. (c)(1)(B)(i)), by failing to require the San Diego County Health and Human Services Agency (the Agency) to give notice to Indian tribes and by finding the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) did not apply. We agree with the ICWA contentions.

BACKGROUND

In January 2008 the Agency filed a dependency petition for one-month-old R.T. The petition alleged 19-year-old B.C. used marijuana. Also, B.C. drove while under the influence of alcohol and with R.T. in an "unrestrained car[ ]seat." The car crashed into a pole, flipping the car seat on its side.

The petition named D.T. as an alleged father. He was a convicted felon with a history of weapons violations, narcotics sales and gang involvement. D.T. was later determined to be R.T.'s biological father.

R.T. was detained in the hospital, in a foster home and with the maternal grandmother. In March 2008 the court entered a true finding on the petition and ordered R.T. placed with the maternal grandmother. In August B.C. was arrested for selling narcotics. The arrest was part of a sting operation targeting gang associates who were "mid-to-high level cocaine dealers and their suppliers." B.C. was jailed for four and one-half months. In January 2009, soon after her release, B.C. tested positive for THC.

The section 366.26 hearing took place in September 2009. R.T. remains with the maternal grandmother, who wishes to adopt her.

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1 Statutory references are to the Welfare and Institutions Code unless otherwise specified.

THE BENEFICIAL RELATIONSHIP EXCEPTION

If a dependent child is adoptable,[2] the juvenile court must terminate parental rights at the section 366.26 hearing unless the parent proves the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W.* (2007) 150 Cal.App.4th 71, 80.) One such exception exists if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The existence of this relationship is determined by factors including "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs. . . ." (*Id.* at p. 576.)

We apply the substantial evidence standard of review, examining the evidence in the light most favorable to the judgment. (*In re Autumn H., supra*, 27 Cal.App.4th at pp. 576-577.) We conclude substantial evidence supports the juvenile court's findings that B.C. maintained regular visitation and contact, but failed to meet her burden of showing a beneficial relationship. (*Id.* at p. 576; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.)

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2 B.C. does not contest the juvenile court's finding that R.T. was adoptable.

At the time of the section 366.26 hearing, R.T. was nearly two years old. She had been out of B.C.'s custody since early infancy and had lived with the maternal grandmother for more than one and one-half years. During that time, B.C. continued her substance abuse and spent time in jail. She never progressed beyond supervised visits. In the period before the section 366.26 hearing, B.C. visited only twice a month. R.T., meanwhile, was thriving, happy and securely attached to the maternal grandmother. B.C. appropriately cared for R.T. during visits and they shared a bond, but R.T. looked to the maternal grandmother for comfort and to meet her needs, even when B.C. was present. R.T. did not have "a substantial, positive emotional attachment" to B.C. such that R.T. would be greatly harmed by the severance of their relationship. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)[3]

ICWA

At the beginning of this case, B.C. said the maternal grandmother had "told her that she has Cherokee Indian heritage." A short time later, B.C. declared, under penalty

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3 B.C. relies on *In re S.B.* (2008) 164 Cal.App.4th 289, in which this court concluded the juvenile court erred by declining to apply the beneficial relationship exception. (*Id.* at p. 301.) That case is distinguishable. There, the child was five years old (*id*. at pp. 293, 295) and the appellant father had been her primary caretaker for three years (*id*. at p. 298). The child continued to display a strong attachment to him after her removal (*id*. at pp. 298-301) and they "had an emotionally significant relationship." (*Id*. at p. 298.) The father fully complied with his case plan, made the child his priority and visited consistently. (*Id*. at pp. 293-294, 298-300.) The child "became upset when the visits ended and wanted to leave with [him]." (*Id.* at p. 294.) B.C., on the other hand, had custody of R.T. for less than two months. B.C. failed to comply with her reunification plan, continued her substance abuse, spent time in jail and maintained her relationship with D.T. despite his gang involvement and criminality.

of perjury, that she had no Indian ancestry as far as she knew and D.T. had no American Indian heritage.

The maternal grandmother reported she was not enrolled in any Indian tribes. Her father had Iroquois heritage and might be enrolled in the Iroquois Tribe, but he had Alzheimer's disease and was unable to furnish any information. The maternal grandmother said she did "not have a lot of information," but added, "they do not vote, own any land, or get money."

At the detention hearing the court deferred ruling on ICWA. At the March 2008 jurisdictional and dispositional hearing the court found ICWA did not apply, but noted the finding could be amended if further information materialized.

In August 2008 the Agency reported B.C. and D.T. said they were "not affiliated with any Native American Tribe, not registered with any tribe, did not live on a reservation, [did] not have a Tribal ID and [did] not receive services from any tribe." D.T. said the paternal great-grandmother might "have some traces of Indian heritage." The paternal great-grandmother said she was not enrolled in any Indian Tribe but the paternal great-great-grandmother, who was very sick and unable to talk, might be affiliated and registered with the Cherokee Tribe.

In October 2008 the court found D.T. was the biological father. At the six-month review hearing in November, the court found ICWA notice was not required because the court had reason to know R.T. was not an Indian child. At the 12-month review hearing in April 2009, the court found the Agency had made a reasonable further ICWA inquiry, there was still no reason to believe R.T. was an Indian child, ICWA notice was not

required and ICWA still did not apply. At the section 366.26 hearing in September, the court again noted ICWA did not apply.

B.C. contends the Agency was required to send ICWA notice to the Iroquois and Cherokee Tribes so they could determine whether R.T. was a member or eligible for membership and whether the tribes should intervene. B.C. concludes the court committed reversible error by finding ICWA did not apply.

" 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C., § 1903(4).) The tribe determines whether a child meets these criterias. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254-255.) The juvenile dependency court and the Agency "have an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child . . . ." (§ 224.3, subd. (a).) If there is reason to know the case involves an Indian child, the Agency must give notice "to all tribes of which the child may be a member or eligible for membership. . . ." (§ 224.2, subds. (a)(3), (b); 25 U.S.C., § 1912(a).) Notice must be given if "a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1); *In re Damian C.* (2009) 178 Cal.App.4th 192, 198.) Because family members "are not necessarily knowledgeable about tribal government or membership and their interests may diverge from those of the tribe" (*In re Mary G.* (2007) 151 Cal.App.4th 184, 212, quoting *In re Kahlen W.* (1991)

233 Cal.App.3d 1414, 1425), a relative's statement that the family lacks sufficient information to determine Indian heritage does not absolve the Agency of its duty to provide ICWA notice (*In re Damian C.*, *supra*, at p. 199).

In *In re Damian C.*, *supra*, 178 Cal.App.4th 192, the mother said she might have Pasqua Yaqui ancestry through the maternal grandfather. (*Id.* at pp. 195, 199.) The maternal grandfather said "he had heard his father . . . was either Yaqui or Navajo Indian, but was later informed the family did not have Indian heritage." (*Id.* at p. 195.) The maternal grandfather did not know which Yaqui or Navajo Tribe might be involved or where the tribe might be located. (*Id.* at pp. 195, 199.) He said the family's attempts to research their possible Indian heritage had been unsuccessful because they lacked enough information. (*Id.* at pp. 195-196, 199.) His father lived in Temecula, California, but the maternal grandfather did not know the address or telephone number. (*Id.* at pp. 196, 199.)

The juvenile court in *In re Damian C.*, *supra*, 178 Cal.App.4th 192 found ICWA did not apply. (*Id.* at pp. 194, 196.) This court remanded for an ICWA inquiry and notice (*id.* at pp. 199-200), stating: "Th[e above] information constituted a 'reason to know that an Indian child is or may be involved' and triggered the requirement to make further inquiry. The Agency additionally was required to provide notice to the federally recognized Navajo and Yaqui Tribes because, even though [the maternal grandfather] reported the family had been unsuccessful in establishing the family's Indian heritage, the question of membership in the tribe rests with the tribe itself. [Citation.]" (*Id.* at p. 199.)

The situation here is similar. The maternal grandmother's report of her father's Iroquois heritage and possible tribal enrollment triggered a duty to give notice to any tribes related to the Iroquois.[4] D.T.'s report of the paternal great-grandmother's possible "traces of Indian heritage," the paternal great-grandmother's report of a paternal great-great-grandmother's possible affiliation and registration with the Cherokee Tribe and B.C.'s statement (later contradicted) concerning the maternal grandmother's Cherokee heritage triggered a duty to notice the Cherokee Tribes. Moreover, the Agency had a duty to make further inquiry. Although it might have been futile to question the two relatives who were reportedly unable to communicate, the record reveals no attempt by the Agency to contact anyone else who might have information, including R.T.'s other grandparents and great-grandparents.

We remand the case to the juvenile court with directions to order the Agency to conduct a further ICWA inquiry and provide ICWA notice to any Iroquois Tribes, the Cherokee Tribes and any other tribes the inquiry identifies. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 711.)

DISPOSITION

The judgment terminating parental rights is reversed. The case is remanded to the juvenile court with directions to order the Agency to (1) conduct a further ICWA inquiry; (2) provide ICWA notice to any Iroquois Tribes, the Cherokee Tribes and any other tribes

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4 Although there is no federally recognized Indian entity called Iroquois (74 Fed. Reg. 40218-02 (Aug. 11, 2009)), there may be federally recognized Indian entities of Iroquois derivation.

the inquiry identifies; and (3) file all required documentation with the juvenile court. If, after proper notice, a tribe claims that R.T. is an Indian child, the juvenile court shall proceed in conformity with ICWA. If, on the other hand, no tribe claims that R.T. is an Indian child, the judgment terminating parental rights shall be reinstated.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.